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Plaintiff Zoya Kovalenko

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

ZOYA KOVALENKO,

Plaintiff,

v.

KIRKLAND & ELLIS LLP, MICHAEL
DE VRIES, MICHAEL W. DEVRIES,
P.C., ADAM ALPER, ADAM R. ALPER,
P.C., AKSHAY DEORAS, AKSHAY S.
DEORAS, P.C., LESLIE SCHMIDT,
LESLIE M. SCHMIDT, P.C., AND
MARK FAHEY,

Defendants.

) Case No. 4:22-cv-05990-HSG

) **PLAINTIFF'S OPPOSITION TO**
) **DEFENDANT KIRKLAND & ELLIS LLP'S**
) **MOTION TO REDACT (DKT. NO. 16)**
) **PLAINTIFF'S COMPLAINT (DKT. NO. 1)**

) JURY TRIAL DEMANDED

) Judge: The Honorable Haywood S. Gilliam, Jr.

Plaintiff hereby opposes and respectfully requests this Court deny Defendant Kirkland & Ellis LLP (“**Defendant**”)’s Motion to Redact (Dkt. No. 16) Plaintiff’s Complaint (Dkt. No. 1).

STATEMENT OF FACTS

Defendant filed its Motion after the close of business on Wednesday, November 23, 2022, around six weeks after Plaintiff filed her Complaint and after Defendant issued statements to the press on October 12, 2022 regarding Plaintiff’s Complaint.

ARGUMENT

This Court should dismiss Defendant’s Motion in its entirety because it is without merit for the reasons detailed below.

I. Defendant Fails to Show Compelling Reasons for Its Requested Redactions

This Court should deny the Motion because Defendant fails to show compelling reasons for its requested redactions. “Under the Ninth Circuit’s jurisprudence in *Kamakana [v. City and County of Honolulu]*, 447 F.3d 1172 (9th Cir. 2006)], a request to seal all or part of a complaint must clearly meet the ‘compelling reasons’ standard and not the ‘good cause’ standard.” *In re NVIDIA Corp. Derivative Litig.*, No. C 06-06110 SBA, Dkt. No. 125, at *5 (N.D. Cal. Apr. 22, 2008). “[T]he proponent of sealing bears the burden with respect to sealing” and “[a] failure to meet that burden means that the default posture of public access prevails.” *Kamakana*, 447 F.3d at 1182. “To seal portions of the complaint[]—the document[] that [is] the heart of this, and every, lawsuit”—Defendant is “required to ‘articulate compelling reasons supported by specific factual findings’ to outweigh the presumption of public access. *See In re Google Play Store Antitrust Litig.*, 556 F. Supp. 3d 1106, 1107 (N.D. Cal. 2021) (quotation omitted).

Defendant contends based on an inapposite, non-controlling decision that the “good-cause” standard applies to information it contends is attorney-client privileged. Mot. 3.¹ This

¹ Defendant unpersuasively cites a case applying the good-cause standard in ruling on a motion to seal a declaration with privileged information related to a discovery motion because the declaration was “only tangentially related to the merits of the case.” *Harrington v. Tackett*, No. 18-CV-00028, 2019 WL 2778106, at *5 (D. Nev. July 2, 2019). In contrast, this Court has stated a complaint is analogous to a dispositive pleading and a motion to seal a complaint must meet the compelling-reasons standard. *NVIDIA*, No. C 06-06110 SBA, at *4–5 (stating good-cause standard “has been typically applied to ‘sealed materials attached to a discovery motion unrelated Plaintiff’s Opposition to Defendant Kirkland & Ellis LLP’s Motion to Redact Complaint

1 Court should dismiss the Motion as to the redactions Defendant claims are attorney-client
 2 privileged because Defendant fails to show compelling reasons warrant redaction. *NVIDIA*, No.
 3 C 06-06110 SBA, at *1 (denying motion to seal complaint that applied “good cause” standard
 4 because “the applicable standard for sealing all or part of a complaint is the ‘compelling reason’
 5 standard”); *see also Kamakana*, 447 F.3d at 1180 (“A ‘good cause’ showing will not, without
 6 more, satisfy a ‘compelling reasons’ test.”). Defendant’s *ipse dixit* conjecture that privileged
 7 information would meet the compelling-reasons standard is insufficient to meet its burden. *See*
 8 *Kamakana*, 447 F.3d at 1182 (“When sealing documents attached to a dispositive pleading, a
 9 district court must ‘base its decision on a compelling reason and articulate the factual basis for
 10 its ruling, without relying on hypothesis or conjecture.’” (citation omitted)).

11 Defendant also fails to meet its burden to demonstrate a compelling reason for restricting
 12 the public’s right to access the remainder of the information it seeks to redact. Defendant “must
 13 make a ‘particularized showing’” of compelling reasons with respect to each redaction. *See, e.g.,*
 14 *Rieckborn v. Velti PLC*, No. 13-cv-03889-WHO, at *2 (N.D. Cal. Oct. 3, 2014) (citing *Foltz v.*
 15 *State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1138 (9th Cir. 2003)). “‘Tepid and general
 16 justifications’ are not enough to support the showing of ‘specific prejudice or harm’ required to
 17 justify sealing.” *Id.* (quotation omitted). Defendant “seeks to seal the remainder of information
 18 [alleged attorney-work product, alleged confidential information, and home addresses] under the
 19 compelling reason standard,” Mot. 3, yet fails to “make a ‘particularized showing’” of compelling
 20 reasons with respect to the redactions. *See Rieckborn*, No. 13-cv-03889-WHO, at *2; Mot. 4–5.

21 **II. Defendant Fails to Establish Its Proposed Redactions Contain Attorney-Client**
 22 **Privileged and/or Protected Attorney-Work Product Information**

23 This Court should deny the Motion because Defendant fails to establish its proposed
 24 redactions contain attorney-client privileged and/or protected attorney-work product
 25 information. For information that a party moves to seal, the party bears the burden of proving
 26 the information it claims is privileged meets all eight elements of the following test: “(1) Where

27 _____
 28 to the merits of the case” (citation omitted)).

1 legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such,
 2 (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are
 3 at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8)
 4 unless the protection be waived.” *See United States v. Graf*, 610 F.3d 1148, 1156 (9th Cir. 2010)).
 5 Here, Defendant broadly proclaims that all proposed redactions for 34 paragraphs and three
 6 footnotes is “protected by the attorney-client privilege/attorney work product privilege because
 7 the information refers to and contains communications to and from various Firm clients, and
 8 legal analysis and legal advice provided to various Firm clients prepared in anticipation of
 9 litigation.”² Powell Decl. ¶¶ 5–6. The Court should deny the Motion because Defendant’s
 10 generic statement is insufficient and does not satisfy its burden to establish privilege applies.

11 **III. Defendant Fails to Demonstrate Legally Sufficient Reasons for Redaction**

12 Defendant fails to satisfy its burden to show information should be redacted based on the
 13 standard it has applied under Civil Local Rule 79-5(c).

14 **A. Defendant Fails to Articulate Adequate Reasons Warranting Redaction**

15 Defendant “had an ample opportunity to demonstrate a compelling reason for sealing,
 16 and squandered it.” *See Google*, 556 F. Supp. 3d at 1107. At best, Defendant “presented nothing
 17 but generic and boilerplate statements for its sealing requests.” *See id.*; Mot. 2, 4–5; *see also*
 18 Powell Decl. ¶ 5. Defendant cites generic principles and relies on conclusory, all-encompassing,
 19 and generic allegations, which are inadequate to override the presumption of public accessibility
 20 of the Complaint. Mot. 4–5.

21 **B. Defendant Provides Insufficient Assertions of Harm to Demonstrate Injury**

22 Defendant makes the conclusory assertion that injury resulting from disclosure of
 23 purported privileged/protected information is “self evident” and that injury would also accrue if
 24 “client identifying information, fee information,” “billing rate information,” and “confidential
 25 personnel information” is not redacted based on a generic assertion of potential competitive harm.

26
 27 ² Plaintiff categorically disputes that any of the information identified for redaction contains
 28 client communications or legal analysis and legal advice provided to Defendant’s clients.
 Defendant proffers nothing to support such claims. *See generally id.*; Mot.

Mot. 5; Powell Decl. ¶¶ 7, 9, 10. However, “[b]road allegations of harm, unsubstantiated by specific examples or articulated reasoning,” are “insufficient.” *Id.* (quoting *Beckman Indus., Inc. v. Int’l Ins. Co.*, 966 F.2d 470, 476 (9th Cir. 1992)); accord Standing Order for Civil Cases Before District Judge Haywood S. Gilliam, Jr. ¶ 30 (N.D. Cal. Jan. 4, 2022) (“Generic and vague references to ‘competitive harm’ are almost always insufficient justification for sealing.”). Defendant’s conclusory assertion—based exclusively on the Powell Declaration—that “keeping such information confidential” gives it a “competitive advantage” is analogous to generic assertions of competitive harm that this Court has found to be insufficient to demonstrate injury. *Google*, 556 F. Supp. 3d at 1107–08 (finding insufficient Google’s “declaration by a ‘Senior Legal Project Manager’” stating disclosure of “‘non-public information’ could, ‘[i]f revealed to competitors and potential business counterparties, . . . disadvantage Google in marketing and in negotiations.”). Here, as in *Google*, Defendant “made no showing whatsoever that might have favored keeping portions of the complaint[] secret, and its ‘failure to meet that burden means that the default posture of public access prevails.’” *Id.* at 1108 (citation omitted). Accordingly, this Court should deny Defendant’s Motion. *See id.*

C. The Motion Does Not Address Insufficiency of Less Restrictive Alternatives

Defendant simply states it could but chose not to seek a more restrictive alternative (i.e., sealing the entire Complaint). Mot. 5. However, saying it did not take the most restrictive approach does not address whether a less restrictive alternative would be sufficient.

IV. Defendant’s Proposed Redactions Are Inconsistent and Unprincipled

Defendant’s proposed redactions are inconsistent and unprincipled, demonstrating the arbitrary and specious nature of its proposed redactions. For example, Defendant proposes redacting basic factual information e.g., “patent assertion analysis,” “infringement charting on the target Defendant’s products,” “[target-defendant] chart” (alteration in original, Complaint ¶ 81), “infringement charting,” “to litigate with an alternative-fee arrangement (namely, with litigation funding).” Powell Decl. Ex. B ¶¶ 81, 83, 85. Conversely, in another paragraph in the Complaint, Defendant only proposes redacting “subsidiary of large client” but does not propose redacting basic factual information almost identical to the aforementioned redactions, e.g., that Plaintiff’s Opposition to Defendant Kirkland & Ellis LLP’s Motion to Redact Complaint

Plaintiff conducted “pre-suit investigation and analysis for another litigation-funded case,” “analyzed and assessed numerous patents’ potential infringement reads across a range of target potential defendants and products . . . and assessed the strength of the patents with the strongest infringement reads,” or that Plaintiff “drafted infringement charts.” Powell Decl. Ex. B ¶ 150. This is but one of myriad examples of Defendant’s unprincipled and haphazard approach to its proposed redactions. The four corners of the Motion and its accompanying exhibits provide no rationale for the contradictory and differential treatment of analogous information throughout with respect to redactions.

V. Defendant Incorrectly and Improperly Styles Its Motion As Administrative

Moving for administrative relief is improper when the matter is “otherwise governed by a federal statute, Federal Rule, local rule, or standing order of the assigned Judge.” Civil L.R. 7-11. Defendant’s Motion falls outside the purview of the Civil Local Rule governing administrative motions given that the request to redact is “otherwise governed by a . . . Federal Rule.” *Id.* At least one Federal Rule governs the Motion. Fed. R. Civ. P. 5.2 (governing redactions and allowing court issuance of protective orders requiring same or limitation of “a nonparty’s remote electronic access to a document filed with the court”). Additionally, the plain language of Civil Local Rule 7-11 does not cover motions to redact an opposing party’s already filed pleading (e.g., a Complaint). *Id.* (listing “motions to file documents under seal” as example of administrative motion). Similarly, Civil Local Rule 79-5 includes only two scenarios in which a motion to seal is properly styled as administrative: (1) “[a] motion to seal a party’s own document”; and (2) “[a] motion to seal . . . a document designated as confidential by another party.” *Id.* 79-5(c), (f). Neither motion is at issue here. Instead, Defendant moves to redact information in Plaintiff’s already-filed Complaint without prior confidentiality designation.³

CONCLUSION

For the reasons above, this Court should deny Defendant’s Motion to redact.

³ Plaintiff timely opposes Defendant’s Motion within two weeks of its filing. *See* Civil L.R. 7-3(a).

1 Respectfully submitted this 1st day of December, 2022.

2 By: /s/ Zoya V. Kovalenko
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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the United States of America that: (1) counsel representing Defendant Kirkland & Ellis LLP (“**Kirkland**”) is being served with a copy of the foregoing document via ECF; and (2) counsel representing each of Kirkland’s co-Defendants is being served with a copy of the foregoing document via email (Lynne Hermle, lchermle@orrick.com; Joseph Liburt, jliburt@orrick.com) on December 1, 2022.

/s/ Zoya Kovalenko
Zoya Kovalenko